IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

MONDAY, THE 13TH AUGUST 2007 / 22ND SRAVANA 1929

WP(C).No. 16387 of 2005(A)

PETITIONER:

KUNHALU, S/O.KOYANNI, PATHAKKARA AMSOM,
KUNNAMPALLY DESOM, PERINTHALMANNA TALUK.

BY ADV. SRI.T.SETHUMADHAVAN

RESPONDENT:

KUNHAHAMMED, S/O.KALLINGAL HAMSAPPA
PATHAKKARA AMSOM, KUNNAMPALLY DESOM,
PERINTHALMANNA TALUK.

BY ADV. SRI.K.M.SATHYANATHA MENON

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX(WPC 16387/05)

PETITIONER'S EXTS.:

EXT.P1: TRUE PHOTOCOPY OF THE REPORT OF THE COMMISSIONER DATED 17.11.2003.

EXT.P1(a): TRUE PHOTOCOPY OF THE PLAN DATED 17.11.2003.

EXT.P2: TRUE PHOTOCOPY OF THE AFFIDAVIT ACCOMPANYING I.A.1066/04 DATED 16.12.2004.

EXT.P3: TRUE PHOTOCOPY OF THE ORDER IN I.A.NO.1066/04 IN O.S.NO.44/01 DATED 5.4.2005.

PIUS C. KURIAKOSE,J.

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W.P.(C) No.16387 of 2005

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Dated: 13th August, 2007

JUDGMENT

Ext.P3 order by which the learned Munsiff dismissed an application submitted by the plaintiff in a suit for fixation of boundary is under challenge in this Writ Petition under Article 227 of the Constitution initiated by the plaintiff. The Advocate Commissioner appointed in the suit filed Ext.P1 report and Ext.P1(a) plan. The boundary presently in dispute is the southern boundary of the defendant's property which going by survey records has a length of 23.7 links. The application to set aside the Commissioner's report was filed by the petitioner alleging that the boundary in dispute has not been shown by the Commissioner in the plan submitted. A certified copy of the plan Ext.P1(a) was made available for my perusal by Mr.T.Sethumadhavan, counsel for the petitioner. It is seen that while the southern and eastern boundaries of the defendant's property fixed by the Advocate Commissioner through his measurement are shown in red ink, the disputed boundary, namely, the northern boundary is not so shown. The learned Munsiff would dismiss the application observing that the non-showing of the southern boundary in the plan submitted by the Advocate Commissioner is only a defect

which can be cured by the Advocate Commissioner at trial. But the fact remains that in the I.A. the Commissioner was examined as C.W.1 and he did depose in his testimony that the southern boundary of the defendant's property separating from the plaint schedule property has not been shown in red line as he has done in the case of the northern and eastern boundaries. In other words, in the deposition itself C.W.1 conceded that there has been omission on his part. Under such circumstances, it was not at all proper on the part of the learned Munsiff to have declined at least a remittance of the plan to the Commissioner on the execuse that the defect can be cured by examining the Commissioner at trial.

2. Learned counsel for the respondent however would take exception even to a remittance of the plan. According to him, in Ext.P1 report it is very clearly stated by the Advocate Commissioner that the southern boundary is marked by a compound wall. The Commissioner also in his deposition as C.W.1 stated that on the southern boundary also there stands a compound wall.

3. It is true that Ext.P1 reports about the existence of a compound wall on the southern boundary. It is also true that in the deposition C.W.1 stated that on the southern boundary there exists

compound wall. But the suit is one for fixation of boundaries and the plan which is submitted by the Advocate Commissioner on the basis of measurement fixing the boundary will be of paramount importance in such a suit. The decree is to be passed in terms of such plan. This being the position, the failure of the Advocate Commissioner to show the southern boundary fixed by him in Ext.P1(a) plan cannot be condoned. Setting aside Ext.P3, I direct the learned Munsiff to remit the plan Ext.P1(a) to the Advocate Commissioner with directions to show the southern boundary in red ink as has been done in the case of the other boundaries of the defendant's property.

4. Mr.Sethumadhavan submitted that the Advocate Commissioner no longer practises in the Perinthalmanna court. The learned Munsiff will make every endeavour to remit the plan to the same Advocate Commissioner himself. But if it is found impracticable, the learned Munsiff will remit the plan to another Advocate in whom he has confidence.

The Writ Petition is allowed as above. No costs.

srd **PIUS C.KURIAKOSE, JUDGE**